

TEN GELEIDE (PREFACE)

DOOR (BY)

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Het vriendenboek dat de ondergetekenden hun collega Chris Coppens als blijk van vriendschap en waardering bij zijn afscheid als hoogleraar kunnen aanbieden, bevat uitsluitend bijdragen die handelen over de geschiedenis van het canoniek recht, het recht van de Latijnse Christelijke kerk. Meer dan het andere ‘geleerde’ recht, het Romeinse, was het canoniek recht in het middeleeuwse (West-)Europa een *ius commune* in eigenlijke zin, een voor eenieder geldend recht, met een actieve wetgever, een functionerende rechterlijke macht en een tot handhaving gereed staande bestuurlijke organisatie. Met de verspreiding van het Katholicisme heeft het canoniek recht zich over grote delen van de wereld uitgebreid.

De geschiedenis van dit *ius commune* is meer dan dertig jaren het werkteerrein geweest van hem die met dit boek geëerd wordt; het ligt dan ook voor de hand dat de auteurs van de hierin opgenomen opstellen deze in zes verschillende talen gesteld hebben. Zij zijn uit meer dan tien verschillende universiteiten afkomstig, een weerspiegeling van het universele karakter van de door collega Coppens beoefende tak van wetenschap.

De ondergetekenden hebben als zaakwaarnemers, *negotiorum gestores*, van de Republiek der Letteren – tot wier leden vanouds ook de juristen gerekend mogen worden - het initiatief genomen dit *liber amicorum* samen te stellen. Met genoegen mochten zij constateren dat hun oproep aan de vakgenoten om aan de totstandkoming van deze bundel mee te werken alom weerklank vond. Zij hopen dat de jonge *emeritus* bij de lezing van de resultaten van veler inspanningen eenzelfde genoegen mag smaken!

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De editors danken het Comité Rechtsgeschiedenis van de Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten en in het bijzonder zijn voorzitter Dirk Heirbaut voor de opname van dit *liber amicorum* in de reeks *Iuris Scripta Historica*. De bijdragen werden in dit kader onderworpen aan een *guaranteed double blind peer review*. Verslagen zijn ter inzage bij de voorzitter.



Chris Coppens in zijn geliefd Italië (Cortona, 2010) – © Annie Coppens-Baeten

PREFACE (TRANSLATION)*

This *Festschrift* - a token of our friendship and high regard - which we four colleagues are offering Chris Coppens on the occasion of his retirement, contains only contributions which treat of the history of Canon law - that is the law of the Latin Christian Church. During the Middle Ages, Canon law was more truly *a ius commune* than the learned Roman Law. It was applicable to all, and comprised a legislative body, a well-functioning judiciary and an ever-ready administrative system. Together with the dissemination of Catholicism, Canon law spread from Europe to parts East and West.

It is the history of the Canon law which has for more than thirty years been the life's work of Chris Coppens, the honorandus of this volume. Accordingly, it should not surprise that the authors, whose articles are included here, should have written in six different languages and should be from more than ten different universities, a true reflection of the universal character of the scholarly discipline which our friend and colleague has made his own.

As voluntary editors - in the tradition of the Republic of Letters - we took the initiative to produce this *liber amicorum*. It was with satisfaction that we noted that our appeal for articles met with enthusiasm from the contributors. Our sincere hope is that emeritus professor Chris Coppens will read this volume with the same pleasure.

* The editors of this volume would like to thank Margaret Hewett (Cape Town) for correcting the English of the Preface and the Biography.

RECOVERING GAMBLING DEBTS IN CLASSICAL CANON LAW

BY

JAN HALLEBEEK *

1. Introduction

In this volume, dedicated to a scholar to whom I am greatly indebted for much expert advice during the years I was employed at the Gerard Noodt Institute of the Catholic University Nijmegen (today Radboud University), I would like to consider a subject which, apart from the fact that it provides insight into everyday medieval life and medieval state of mind, is illustrative of the intertwining of canon law and civil law scholarship in the twelfth and thirteenth centuries.

The authoritative texts of both disciplines, the *Decretum Gratiani* and the *Corpus iuris civilis*, contained provisions, dealing with gaming and gambling. The Roman texts on the subject were merely intended for the lecture room. Canon law, however, was directed rather to practice. Prior to thirteenth century attempts in some parts of Europe to use Roman law as the basis for secular legislation, such as the *Liber Augustalis* in Sicily (1231) and the *Siete Partidas* in Castile (1265), arguments derived from the *Corpus iuris civilis* were adopted by the canonists, and thus, the Roman texts acquired practical significance. This was the earliest reception of Roman law which was, moreover, not restricted to any region within Europe, since canon law was of a universal nature and applied to all the faithful, irrespective of their origin, age, gender or social status.

Firstly, it is necessary to consider the terms of these provisions, which were handed down from Antiquity both in the ecclesiastical sources and in Roman law. Secondly, we will discuss an early disagreement within civilian scholarship regarding the question whether gambling debts, paid to the winner of the game, can be claimed back by the loser. Finally, the arguments of the scholars of canon law will be discussed. Their statements and teachings, concerning the same problem, will be presented in a chronological order, irrespective of the nature of their writings: glosses, commentaries, treatises, lectures, etc. This will enable us to see which Roman arguments penetrated the canon law approach to the question, when this happened and whether these arguments constituted a decisive factor. In our search we will also encounter the apparatus *Animal*

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est substantia, an important commentary on the *Decretum*, which thanks to the many years' efforts of the honorand, is nowadays largely available on the internet.¹

2. Provisions on gaming and gambling

Provisions concerning gaming and gambling can be found in the *Corpus iuris civilis* as well as the authoritative texts of canon law. As regards civil law, both the Digest and the *Codex Justinianus* contain a title *De aleatoribus*, dealing with dice players. According to the Digest, the manager of the dicing game is not protected when during the play he is robbed or beaten up, but the players can hold each other liable for robbery (D. 11.5.1). Furthermore, betting for money is only allowed in a restricted number of sporting events *virtutis causa*, i.e. testing the athletes' skills, explicitly mentioned, *viz.* throwing pikes, throwing javelins, racing, high jumping, wrestling and pugilism (D. 11.5.2-3). Gaming debts, paid by slaves or children under paternal control, can be claimed back by their masters or *patres familias*. However, masters and *patres familias* are liable to reimburse these debts for no more than the *peculium*, i.e. that part of the master's or father's property which the slave or son has at his disposal (D. 11.5.4). Thus, the Digest title contains no general prohibition against dicing or gambling, although the players are qualified as *indigni*, i.e. unworthy (D. 11.5.1.1). There are also certain restrictions. For example, someone may not be compelled to participate (D. 11.5.1.4). Also in other titles of the Digest we can find texts dealing with dicing and gambling. According to D. 44.5.2.1 a person who sells something, while dicing and in order to continue dicing, is not liable to the buyer for eviction.

The provisions in the *Codex Justinianus* seem to be stricter. Consider the constitution *Alearum lusus* (C. 3.43.1, dating from 529) of Justinian (ca. 482-565). This was originally a Greek constitution which in the Middle Ages was summarized and translated into Latin, as was the case with other Greek constitutions. In the Paul Krüger (1840-1926) edition of the *Codex Justinianus* (1877) such a medieval Latin version was sometimes added to the original Greek or the Latin text was inserted where the Greek was lost. Moreover, the constitution *Alearum lusus* in its medieval (translated) form was adopted in the title C. 3.43. It was added in the twelfth century to the manuscript London, British Library, Harley 5117 and in the thirteenth century to the manuscripts Biblioteca Vaticana, vat. lat. 1427 and Fulda, Hessische Landesbibliothek, D. 4.² In this constitution Justinian ordered that no one should gamble, except in the case of the five games explicitly mentioned and for no more than one gold piece (*solidum*). These games, which were listed by their Greek names, were other than those mentioned in D. 11.5.2.1, *viz.* hurdle racing, pole jumping, pole punting, horseracing and wrestling. Furthermore, the constitution ruled that players who lost, or their heirs or the local authorities on their behalf, were entitled for a period of fifty years to claim back the

¹ www.medcanonlaw.nl/Animal_est_substantia/Distinctiones.html (retrieved August 2011).

² See: P. KRÜGER, *Codex Iustinianus*, Berlin, 1877, 295. See about the addition in the manuscript Fulda: G. DOLEZALEK, *Repertorium manuscriptorum veterum Codicis Iustiniani*, (Ius Commune Sonderhefte, XXIII), I, 199.

gaming debts which were paid to the winner. Another relevant provision had its origin in the *Authenticum* of Justinian (Nov. 123.10) and was adopted in the *Codex Justinianus* as the *authentica Interdicimus*, after C. 1.3.17. Here clerics were forbidden to play or watch a board game (*tabula*) or to attend any spectacle. If they did, they could be discharged from their office for three years.

This aversion to board games also featured in an ecclesiastical provision, known as canon 79 of the Council of Elvira (306?), although it may have been of a later date. In this text not only clerics, but all Christians are threatened with excommunication for participating in board games for money.³ Apart from the objectionable nature of games of chance, the Christian aversion can further be explained by the fact that board games in Antiquity were provided with images of pagan deities. This could also have been the background to the homily against dicing *De aleatoribus* by Pseudo-Cyprian, dating from the third or fourth century AD. The most important ecclesiastical provision for medieval canon law, however, was derived from the so-called *Canones apostolorum*. This collection was probably compiled in Syria by the end of the fourth century. For the Eastern Church it gained the force of law at the Council of Trullo (692). Dionysius Exiguus († ca. 540) translated fifty of these canons into Latin. Two of these pronounced upon dicing and gambling.⁴ The first forbade the higher clergy to dice and get drunk and threatened them with deposition if they did not conform. The second forbade the lower clergy and members of the laity to do the same on penalty of excommunication. In their version of Dionysius, these provisions were adopted in the *Libri duo de synodalibus causis et disciplinis ecclesiasticis* of Regino of Prüm (ca. 840-915), and later in the *Decretum Gratiani*.

D.35 c.1 *Diaconus, presbiter et episcopus ebrietati et aleae deseruientes, nisi desierint, deponantur. Episcopus, aut presbiter, aut diaconus, aleae atque ebrietati deseruiens, aut desinat, aut certe dampnetur. Subdiaconus autem, aut lector, aut cantor similia faciens, aut desinat, aut communionem priuetur. Similiter et laicus.*

3. A dispute among the civilians

The question of whether or not he, who lost a game and paid the winner, can claim back what he paid, was discussed among the civilians before the canonists identified it as a legal problem. The oldest source which reflects a dispute is probably the *Summa Codicis* of the glossator Placentinus († 1192) which came into existence during Placentinus' first stay at Montpellier (approximately between 1162 and 1180). In his commentary on C. 3.43 he raised the question and gave his own opinion. However,

³ Text in C.J. HEFELE, *Conciliengeschichte nach den Quellen bearbeitet*, I, Freiburg 1855, 160: 'De his qui tabulam ludunt. Si quis fidelis aleam, id est tabulam, luserit numis, placuit eum abstinere; et si emendatus cessaverit, post annum poterit communioni reconciliari.'

⁴ *Canones Apostolorum* 42 (41) and 43 (42); text in HEFELE, *Conciliengeschichte (supra*, n. 3), I, 788, who considers these canons to belong to the oldest of the compilation.

this question may already have been controversial, in view of the legal arguments in favour and against this opinion, produced by later glossators. First Placentinus described the two instances in which the Digest considered it was allowed to play for money. The first was at a meal, where food could be the stake of the game (D. 11.5.4pr). Secondly, betting was allowed with regard to the branches of sport exercised *virtutis causa* and explicitly mentioned in D. 11.5.2, except for pugilism (here termed *recalcitrare*), which, according to Placentinus, was practised in the province. In betting on these games it was also allowed to provide a surety, *guadia* as the Lombards called it, but not in other games.⁵ Subsequently the above question was raised. If someone had contractual capacity, was of age, in full possession of his faculties and no prodigal and he played for money and lost, he could not be summoned, not even if he had made a promise by stipulation. However, if he paid his gaming debts or provided a pledge, he would have no remedy to claim. This is substantiated by only one argument: although it is not allowed to play for money, this is no universal (*perpetue*) prohibition.⁶ Here Placentinus entirely disregarded Justinian's constitution of 529 (cf. C. 3.43.1), which stated that one gold piece was the maximum bet and that gaming debts could be claimed back for fifty years. Indeed he took the opposite view by teaching that gaming debts, paid out to the winner, cannot be claimed back. Grounds for this are lacking. The text continues discussing more specific cases, such as when a slave or son under paternal control participates in a game of chance.

Placentinus' view is mentioned, discussed and rejected in the *Summa Codicis* of Azo (ca. 1150-1230) and in the Ordinary Gloss of Accursius (ca. 1182-1263). Here it appears that a number of arguments could be found both to reject and to support the opinion. Azo first added another argument in favour of Placentinus' view, namely that his own turpitude prevents the plaintiff from bringing a claim. However, this argument applied according to Azo, to the *condictio ob turpem causam*, i.e. where I gave you something, to encourage your turpitude. But where I have given something in order to enter into a forbidden contract, there is a difference. In the latter case the Greek constitution seems to grant a period for reclaiming of fifty years. Nor does the text of D. 44.5.2.1 constitute an obstacle, when it says that he who sells his goods while playing, is not liable for eviction, because the buyer buys at his own risk. According to Azo, this text shows that the game is prohibited, but the sale is not. Thus, when I gamble away

⁵ The *guadia* or *wadia* was the promise by a surety to hand over a *festuca* (stick) to the recipient of the promise, which handing over symbolized the obligation by which the two were bound.

⁶ PLACENTINUS, *Summa Codicis*, Mainz, 1536 (reprint Turin, 1962), ad C. 3.43 (fol. 129): '(...) *Ludere in alea non est permittum pro pecunia, praeterquam in familia et uescendi causa et praeterquam si quis certet hasta, uel pilo faciendo, currendo, saliendo, luctando, quod uirtutis causa fiat, ut ff. eod. l. ii (D. 11.5.2), non recalcitrando, sicut fit in prouincia. Sed et in praedictis sponsionem, quam Longobardi gaudias (lege: guadias jh) uocant, facere licet, ex caeteris non licet ut ff. eod. l. iii (D. 11.5.3). Sed paterfamilias, maior, mentis compos, non prodigus, in pecuniam ludendo uictus fuerit, licet conueniri non possit, etiamsi stipulatio intercesserit, puto tamen quia si soluerit, pignusue dederit, remedio carebit. Licet enim ludere in pecuniam sit prohibitum, non est perpetuo prohibitum. (...).*'

my goods, I will not be denied reclamation.⁷ This reasoning of Azo's can be found in the Accursian gloss *aduersus* ad D. 11.5.4.2. All that Accursius had added was a further explanation of the contractual character of the game by referring to the parties' consent that the one with the highest score will win.⁸

In summary, amongst the civilians there was a dispute concerning the question whether gaming debts can be reclaimed. Placentinus taught that this is impossible, but Azo, Accursius and possibly all main stream glossators rejected this view. In support of Placentinus' view were the provisions indicating that gambling was not generally prohibited (D. 11.5.2 i.f., D. 11.5.3, D. 11.5.4pr and D. 44.5.2.1) and texts showing that his own turpitude prevents a plaintiff from bringing a claim (D. 12.5.8). Strong support for the majority stand of Azo and Accursius was the constitution *Alearum lusus* (C. 3.43.1) which was not mentioned by Placentinus. Possibly he was totally unaware of its existence. The glossators in favour of recovering the gambling debts did not discuss the question which remedy could be used by the plaintiff. As a matter of fact, this question depends on whether or not ownership was transferred to the recipient. The authentica *Interdicimus* was not mentioned in the debate, but that can be explained by the fact that it merely applied to clerics.

4. Canon law teaching

a. An early view

The earliest canonists who raised the question, dealt with by Placentinus, were Huguccio († 1210) and Bazianus († 1197). However, Huguccio's point of departure was not the loser's right to reclaim, but the winner's duty to restore. In his *Summa decretorum*, completed between 1188 and 1190, there were only two concise observations concerning he who acquired something through dicing. The latter had to restore what he acquired, otherwise no appropriate satisfaction was achieved. Secondly, the acquisition encompassed a transfer of ownership. Thus, the text did not mention a possible remedy for the loser. It only excluded the possibility of his vindicating the money or other property gambled away.

⁷ AZO, *Summa Codicis*, Turin, 1578, ad C. 3.43-44 (fol. 65 vb), n. 22-23: '(...) *Si autem paterfamilias in ludo amiserit, ait P. non dari repetitionem eius quod in ludo est amissum, quia licet sit prohibitum ludere, non tamen est perpetuo prohibitum. Item et alia ratione, quia turpitudine uidetur obstare agenti. Sed hoc forte locum habet in conditione ob turpem causam, cum dedi ut quid turpe facias. Sed si dedi contrahendo, ubi lex contractum prohibet, contrarium est, ut infra de agri. et censi. l. Quemadmodum* (C. 11.48(47).7). *Item graeca constitutio usque quinquaginta annos uidetur dare repetitionem* (cf. C. 3.43.1). *Nec obstat quod legitur in ff. quarum rerum actio non da. l. Si filio § i.* (D. 44.5.2.1). *Nam et si in alea rem uendam, aut ludam, et res euincatur, non teneor de euictione, quia emptor suo periculo uidetur rem emisse. Item nec ibi erat prohibita uenditio, sed ludus. Item et si rem lusero, ibi non denegat repetitionem.*'

⁸ The gloss *aduersus* ad D. 11.5.4.2: '(...) *Hic cum uidetur pacisci, ut meliora puncta habens uincat* (...).'

Huguccio, *Summa decretorum*, ad D.35 c.1.⁹

'alee: Set numquid tenetur quis reddere, quod in tali uel alio illicito ludo acquirit? Credo quod sic; alius non digne satisfaciet, si reddere poterit. Sed numquid in tali acquisito transfertur dominium? Credo quod sic.'

The opinion of Bazianus, cited in the *Glossa Palatina* (ca. 1214), is difficult to date, but we may presume that this canonist was active in Bologna between 1180 and 1190, i.e. at the time or just after Huguccio wrote his *Summa decretorum*. The fragment cited shows the remarkable influence of Roman law. This time the starting point is the loser who desires to reclaim what he paid. The answer is in conformity with the teachings of Placentinus in his *Summa Codicis*, although Bazianus added that what was acquired should, in view of C.14 q.5 c.15, be given to the Church or the poor. The argument *melior est conditio possidentis* is reminiscent of various texts in the *Corpus iuris civilis*, which state that when both giver and recipient are tainted, there can be no recovery of what was handed over: the actual possessor has the better position.¹⁰

Glossa Palatina, ad D.35 c.1.¹¹

'Pone ergo, quod aliquis amisit ad aleam. Numquid potest repetere? Bazia[nus] dixit quod non, set pecuniam sic acquisitam dixit ecclesie uel pauperibus erogandam, arg. xiiii. q. v. Non sane (C.14 q.5 c.15). Nam dicebat turpem esse causam et ideo meliorem possidentis conditionem.'

In the second recension of the apparatus *Ius naturale* of Alanus Anglicus, dating from about 1205, the influence of Roman law seems to have increased. First it is mentioned that in some situations dicing is allowed. Subsequently there is an explicit reference to Placentinus' opinion, that what the loser paid to the winner cannot be recovered. This position is supported with two further arguments: ownership has been transferred and when both parties are tainted, the possessor has the better position. This time we find references to the Digest and the Codex for this Roman maxim. Moreover, the author seems to be aware of the existence of a Greek constitution, stating that gaming debts can be recovered for a period of fifty years. However, it did not prevent the author from following Placentinus' argument.

Alanus Anglicus, Apparatus *Ius naturale*, recensio longior ad D.35 c.1.¹²

'Ludus alee uel alterius generis cuiuscumque intelligitur illicitus, non solum clericis ut hic sed etiam laicis, hic et ff. de aleatoribus Solent enim (D. 11.5.2). Numquid modicum in sponsione deducatur, potius recreationis causa

⁹ Biblioteca Apostolica Vaticana, vat. lat. 2880 (folio numbers hardly legible), Admont, Stiftsbibliothek 7, fol. 51ra, Biblioteca Apostolica Vaticana, Archivio di San Pietro C 114, fol. 44va and Paris Bibliothèque Nationale, lat. 15396, fol. 39vb.

¹⁰ Cf. D. 12.5.3, D. 12.5.8 and D. 12.7.5pr.

¹¹ Biblioteca Apostolica Vaticana, regin. lat. 977, fol. 24vb, Biblioteca Apostolica Vaticana, pal. lat. 658, fol. 9va and Laon, Bibliothèque Municipale 476, fol. 21vab.

¹² Paris, Bibliothèque Nationale, lat. 15393, fol. 27vb.

quorundam hic, ut esculentum et potulentum, uel alias pecunia numerata <est> modica? Sic ludere licitum est laicis, ut ff. de aleatoribus l. ult et penult (D. 11.5.3-4) et forte clericis in alia genere ludi ab<sue> alea et taxillis. In istis autem non, quia quidem infames ludi sint. Ergo queritur an quod in ludo perditur peti possit? Hoc in iudicio p[la]centini quod non. Est enim translatum dominium et cum turpitude sit ex utraque parte, durior est conditio petentis ut ff. de cond. ob t. c. l. Si ob turpem (D. 12.5.8) et C. e. l. i. et ii. (C. 4.7.1-2). Hac eadem ratione nec quod est amissum repeti potest. Sed numquid si pygnus fuerit datum? Teneretur forte sic. Fideiussorem tamen numquam credo teneri. Sed secundum constitutionem grecam C. de relig. et sump. funerum ... alear. usus (cf. C. 3.43.1) usque ad l. annos competit repetitio. Ille autem qui aleatores fauet et eis peccuniam mutuat ludo, inhoneste enim fecerat. Si reddere noluit, eos conuenire non potest, ff. de aleatoribus l. i. (D. 11.5.1).'

The constitution referred to here is in all probability *Alearum lusus*. It is interesting that it is referred to as a Greek constitution and that it seems to be incorporated in C. 3.44 and not in C. 3.43. What exactly is meant here will become clear below.

b. A turning point

It should not surprise us that the Parisian apparatus *Animal est substantia*, previously known as the *Summa Bambergensis* and dating from the period 1206-1210, also shows strong influences of the civilian tradition. The difference to the earlier apparatus, however, is remarkable. For the first time we find references to the decretals, collected in the *Breviarium extravagantium* (1189-1192) of Bernard of Pavia († 1213), and to the authentica *Interdicimus*. It is possible that previously, i.e. prior to 1205, *Interdicimus* was not yet inserted in the first book of the Codex as an authentica. It is also remarkable that, regarding the question whether gambling debts can be recovered, the author of the *Animal* decided not to follow the opinion of Placentinus, but to adopt the opposite stance, as did in later times Azo and the Accursian Gloss. The constitution *Alearum lusus* of Justinian seems to have provided the decisive argument for this new view. The author of the *Animal* made two interesting remarks concerning this constitution. Firstly he qualified it as recent (*noua*) and secondly he suggested that it would have been better to insert it in title C. 3.44 (on sacred places and funeral expenses), than in title C. 3.43 (on dicing and dice players).¹³ This may indicate that not so very long before 1205 the text of the constitution *Alearum lusus* was added to the *Codex*.

Special attention was paid to Alanus' argument that, when both parties are tainted, the actual possessor has the better position. However, this argument was overruled by the reasoning, found later in Azo, that the ground for handing over money

¹³ As stated above, in some of the old editions of the Codex the constitution was indeed inserted under the title on sacred places and funeral expenses as *lex 15*.

to the winner, was no turpitude, but simply a ground (*causa*) the law considered null and void. Despite the fact that the *causa* is void, the author of the *Animal* considered, at least in the manuscript Bamberg Staatsbibliothek can. 42, that ownership passed to the recipient. For this seemingly inconsistent reasoning no further explanation was given.

Animal est substantia, ad D.35 c.1.¹⁴

‘*alee. Alea dicitur omnis casus fortuitus, ff. De hereditate vendita. Cum hereditatem (D. 18.4.17). Prohibitum autem est sacerdoti ludere ad aleam et etiam quod nec debet ludentes inspicere, Cod. De sanctis episcopis. in aut. Interdicimus (C. 1.3.17 aut. ibi posita [Nov. 123.10]), extra Ne clerici vel monachi se immisceant. c.i. (1Comp. 3.37.1 [X 3,50,1]), extra De vita et honestate clericorum. Statuimus (1Comp. 3.1.9). Et notandum quod omne illud quod amisit aliquis ad aleam, potest repetere usque ad .l. annos, sicut dicit constitutio nova domini Iustiniani que sic incipit Alearum ludus (cf. C. 3.43.1). Que constitutio debet esse in Cod. De religiosis (C. 3.44) et non est. Tamen dicunt quidam quod non potest repetere cum turpitudine sit ex utraque parte. Set non credo quod ille habeat ex turpi causa, quia iste non dedit ei ut luderet, set potius ex causa quam lex nulla reputat. Potest autem fieri elemosina de tali quia transit ibi dominium, dummodo habeatur unde possit restituere, nam restituere tenetur, .xiii. q.v. Non sane (C.14 q.5 c.15).’*

In other manuscripts of the *Animal* we find additional information concerning both the constitution *Alearum lusus* and the recovering of gaming debts. In the manuscript Bernkastel Kues Nosocomium Sancti Nicolai 223 the constitution is qualified as edited in Greek,¹⁵ while in the manuscript Liège Bibliothèque de l’Université 127E Cat. 499, it is written that a certain cardinal translated this provision into Latin. In the manuscript the word *cardinalis* is not abbreviated as c. or car., but written at length.

Animal est substantia, ad D.35 c.1.¹⁶

‘*Si quis uero luserit ad aleam ea que amittit potest repetere usque ad .l. annos ex constitutione quadam domini Iustiniani in greco dicta que sic incipit Alearum ludus (cf. C. 3.43.1), que poni debuisset in eodem titulo de religiosis et sumptibus funerum et alleatoribus (C. 3.44). Et quidam cardinalis transtulit legem illam in latinum.’*

¹⁴ Bamberg, Staatsbibliothek, can. 42 [P. II. 15], fol. 32vb, the transcription is derived from the digital edition by Coppens, *supra* n. 1.

¹⁵ The transcription is again derived from the digital edition. Bernkastel Kues, Nosocomium Sancti Nicolai 223, fol. 22rb: ‘*Si quis luserit ad aleam ea que amiserit poterit repetere usque ad .l. annos ex constitutione quadam domini Iustiniani in greco edita que sic incipit: Alearum ludus (cf. C. 3.43.1), que debuisset poni in Codice in t. De religiosis et sumptibus funerum et aleatoribus (Cf. C. 3.44).’*

¹⁶ This is my own transcription from Liège, Bibliothèque de l’Université 127E, Cat. 499, fol. 28rb.

As regards recovering gaming debts, the manuscript Bernkastel Kues Nosocomium Sancti Nicolai 223 explains that the money was not handed over on the grounds of turpitude, since it was not given to promote dicing. The gaming contract was simply invalid. Thus the recipient was retaining what he received without justification. As a consequence, what was performed in view of this void contract could be recovered, just as a serf, alienated without the immoveable, could be recovered (C. 11.48[47].7) and the dowry, a woman had given to her mother's brother with a view to marriage, could be recovered (D. 12.7.5).¹⁷ This reasoning indicates that ownership did not pass to the recipient, which opinion is consistent with civilian doctrine. This is also confirmed by the reading of the manuscript Liège Bibliothèque de l'Université 127E Cat. 499, which states that the plaintiff could bring an action because his goods (*res sua!*) remained with the recipient without good *causa*.¹⁸

Alanus' opinion was apparently traditional. The manuscript Liège states that this was the view contained in the glosses. As we saw above, Alanus started with the validity of the gaming and taught that ownership of the money or other property, handed over to the winner, will pass to the winner. By contrast, the author of the *Animal* started from the invalidity of the gaming. Accordingly, ownership did not pass to the recipient because of a lack of sufficient justification, or to say in civilian terms a lack of *iusta causa*. This logical implication of a different premise was not yet fully implemented in the manuscript Bamberg can. 42, which still retained some part of the traditional view, *viz.* that ownership was transferred to the recipient.

In the decretal *Inter dilectos* of 1209,¹⁹ Pope Innocent III (1160/61-1216) complained about the established gaming practice of French clerics. He strongly disapproved of this habit, calling it a 'perverse custom', which should rather be

¹⁷ The transcription is again derived from the digital edition. Bernkastel Kues, Nosocomium Sancti Nicolai 223, fol. 22rb: '*Dicunt tamen quidam quod alleator amissa non potest repetere, eo quod turpitudine intervenit ex utraque parte et ideo melior est conditio possidentis. Set dicimus quod etiamsi turpitudine sit ex utraque parte, tamen ille non accipit ex turpi causa. Nam ille non dedit ut alter luderet. Nam in hoc casu repetere non posset ob turpem causam, set reppetit quia res sua sine causa est penes eum, scilicet casu fortuito quod a lege interdictum est. Vel potest dici quod est causa specialis in quo licet repetere aliquid, licet turpitudine sit tradita. Dicimus quod res eius est apud eum sine causa et ideo competit repetitio, ff. De conditione sine causa. l. penult. (D. 12.7.4). Bene enim invenimus quod contractus non valet et tamen potest repeti quod datum est, puta inhibetur ne servus venditur sine gleba, tamen si venditus fuerit potest repeti, Cod. De agricolis censitis. Quemadmodum (C. 11.48(47).7). Sicut si (...) nupsit advunculus (?) potest repetere quod dedit in dotem, ff. De conditione sine causa. l. ult. (D. 12.6.67).'*'

¹⁸ The transcription is again derived from the digital edition. Liège, Bibliothèque de l'Université 127E, Cat. 499, fol. 29rb: '*Dicunt quod aleator amissa non potest repetere sicut continetur in glossis, eo quod turpitudine provenit ex utraque parte et ita melior est conditio possidentis. Set quod etiamsi turpitudine sit ex utraque parte, tamen ille non accipit ex turpi causa. Nam iste non dedit ut alter luderet. Nam in hoc casu non posset agere ob turpem causam, set repetit quia res sua sine causa residet penes eum, scilicet casu fortuito quod a lege interdictum est.'*'

¹⁹ A. POTTHAST, *Regesta Pontificum Romanorum*, I, Berlin, 1874 (reprint Graz, 1957), n. 3662 (316).

described as depravation. About 1210 this decretal was adopted in the *Compilatio tertia* of Petrus Beneventanus († 1219/20).²⁰ The apparatus on this collection by Johannes Teutonicus (ca. 1170-1245) does not, however, pronounce upon the possibility of recovering gaming debts.²¹

As stated above, the *Glossa Palatina* of Laurentius Hispanus (ca. 1180-1248), dating from about 1214, referred to the early opinion among the canonists as stated by Bazianus, but this was not the doctrine it followed. The *Glossa Palatina* started by referring to the authentica *Interdicimus*, explaining this text was included in the *Codex* in connection with the *lex Placet* (C. 1.3.17). Then after describing the opinion of Bazianus, it continued by stating that the money, handed over to the winner, can be recovered. The first argument to support this view was derived from D. 11.5.4.2. In view of the specific context, however, it does not seem very convincing to generalize this provision. Unlike the *Animal*, the *Glossa Palatina* did not consider gaming to be a void contract and even maintained that ownership would pass to the recipient. This excluded the possibility of vindicating the money or other property, handed over to the winner. Three arguments were adduced to support the view that, despite ownership having been transferred, there was room for recovery. The first was the entire Digest title on duress, showing that, when under duress ownership of something is transferred, it can still be claimed back. The second was the text of D. 44.5.2.1, stating that he who sold something while gambling, was not liable for eviction. It seems that this provision was taken to imply that such a seller can with impunity claim back what he sold and delivered, but it is doubtful whether this was indeed the purport of the text, at least in its Justinianic context. The third was again the Greek constitution, about which the *Glossa Palatina* provided new information. It had recently (*nouiter*) been translated. Moreover, the name of the translator was mentioned, viz. *b. de cardona*. The conclusion of this was that the loser of the game can recover what he handed over to the winner and if he had not yet performed, he could bar the winner's remedy.

²⁰ 3Comp. 5.14.4: '(...) nos tamen, qui ex officii nostri debito pestes huiusmodi exstirpare proponimus, atque ludos uoluptuosos, occasione quorum sub quadam curialitatis imagine ad dissolutionis materiam deuenitur, penitus improbamus, excusationem praedictam, quae per prauam consuetudinem, quae corruptela dicenda est potius, palliatur, friuolam reputantes, (...)'

²¹ This apparatus of Johannes Teutonicus was, after the manuscript Admont, Stiftsbibliothek 22, made available through the internet by Kenneth Pennington. For the glosses on 3Comp. 5.14.4 see: <http://faculty.cua.edu/pennington/edit501.htm> (retrieved August 2011).

Glossa Palatina ad D.35 c.1.²²

‘*Melius credo eam repetendam, arg. ff. de alea. Quod in conuiuio § ult. (D. 11.5.4.2). Licet enim dominium translatum sit, tamen repeti potest, sicut et ubi per metum dominium transfertur, ff. quod metus causa (D. 4.2). Nam et dicit lex quod, si in alea existens, uendidero hereditatem uel alia bona, non teneor de euictione ff. quarum rerum ac. non datur Si filio § i (D. 44.5.2.1). Item dicit constitutio, nouiter de greco in latinum translata per quendam b. de cardona (cf. C. 3.43.1), quod usque ad xxx annos potest repetere quis, quod in alea amisit. Et pignora obligata in eam causam usque l. annos repeti possunt. Dic ergo quod peccat qui eam non restituit et ille qui amisit potest repetere uel, si nondum soluit, multo magis excipere.*’

The provision of D.35 c.1 regarding clerics was more or less confirmed by one of the constitutions of the Fourth Lateran Council of 1215. Canon 16 of this Council mentioned gambling as part of a more general prohibition. Clerics were banned from practicing secular offices or engaging in secular trading, especially when this was dishonourable. They should not attend comedies and performances of comedians and actors. They had to avoid taverns, except out of necessity when travelling. They should not gamble or play dice, nor be present when such games were played.²³ Watching was also prohibited as was laid down in the authentic *Interdicimus*. In 1216 this constitution was adopted in the *Compilatio quarta* of Johannes Teutonicus as the decretal *Clerici* (4Comp. 3.1.4).

c. Who composed the Latin epitome of *Alearum lusus*?

As we have seen the author of the *Animal est substantia* maintained that a certain *cardinalis* was the translator of the constitution *Alearum lusus*, while Laurentius Hispanus stated it was someone by the name of B. (maybe Bernardus or Bernardo) de Cardona. Who was this translator? It was the German jurist Hermann Wilhelm Hach (1800-1867) who noticed that the manuscript London, British Library, Harley 5117 contains some Latin translations of Greek constitutions which were added to the text of the *Codex*. At fol. 47 he found a translation of C. 3.10.2, a constitution by Emperor Zeno († 491), copied by the same hand as the principal text and provided with a

²² Biblioteca Apostolica Vaticana, regin. lat. 977, fol. 24vb, Biblioteca Apostolica Vaticana, pal. lat. 658, ad fol. 9va and Laon, Bibliothèque Municipale 476, fol. 21vab. According to the *Glossa Palatina* chess is not prohibited if it is not played for money: *Quid de ludo scaccorum? Non prohibetur quia ibi potius humanum ingenium exercetur, nisi ad pecuniam*. A similar view was already expressed in the apparatus *Ius naturale* of Alanus. Paris, B.N. lat. 15393, uppermost gloss at fol. 27vb. It can also be found in the gloss *ad tabulas* ad Auth. post C. 1.3.17.

²³ See canon 16: *Clerici officia vel commercia saecularia non excerceant, maxime inhonesta, mimis, ioculatoribus et histrionibus non intendant et tabernas prorsus evitent, nisi forte causa necessitatis in itinere constitui; ad aleas vel taxillos non ludant, nec huiusmodi ludis intersint (...)*. Text in J. ALBERIGO and H. JEDIN, *Conciliorum oecumenicorum decreta*, Bologna, 1973, 243.

noteworthy comment: *Constitutio a domino Petro de Cordona translata de graeco in latinum*. In the same manuscript the Latin text of *Alearum lusus* was added, but in a different hand and without such reference to a translator.²⁴ Further, it was the Leiden professor Willem Matthias d’Ablaing (1851-1889) who noticed that the civilian glossator Johannes Bassianus (ca. 1180) in his *Lectura Institutionum* ad Inst. 3.7.3 revealed that the text of C. 6.4.4 was summarized and translated from the Greek by Petrus de Cardona.²⁵ This text had already been edited by Jacques Cujas (1520-1590)²⁶ and was again found by Friedrich Carl von Savigny (1779-1861) in a Göttingen manuscript.²⁷ Krüger added it to his *editio maior* of the *Codex*.²⁸

According to the secondary literature, the translation of C. 3.10.2 and the translated epitome of C. 6.4.4 were the work of one and the same person, *viz.* the Catalan canonist Pedro de Cardona († 1183), a student of Placentinus. Accordingly, it is not unlikely that also the constitution *Alearum lusus* was a provision which Pedro de Cardona had summarized and translated from the Greek into Latin, although the manuscripts Biblioteca Apostolica Vaticana, regin. lat. 977 and Biblioteca Apostolica Vaticana, pal. lat. 658 definitely read *b. de cardona* and not *p. de cardona*.²⁹ In the manuscript Liège of the *Animal* a certain *cardinalis* was mentioned as translator, but this does not exclude the authorship of Pedro de Cardona, since the latter was created cardinal in 1181.³⁰ As we have seen, the sources also indicate that probably by the end of the twelfth century this new translation became known and was included in the *Codex*. This is in conformity with the fact that Krüger used the Latin text as it was added to one twelfth century manuscript and two (early) thirteenth century manuscripts.

d. Later doctrine

The question whether gambling debts have to be paid back was also treated extensively in the penitential *Summa* of Raymond of Peñafort (c. 1180-1275), which is supposed to have come into being between 1222 and the promulgation of the *Liber Extra* in 1234. Being a manual for confessors, it contained detailed casuistry and also

²⁴ H.W. HACH, Kurze Nachricht von einigen, in Englischen Bibliotheken aufbewahrten, Handschriften, welche Theile des Corpus juris civilis enthalten, *Zeitschrift für geschichtliche Rechtswissenschaft* 1825, 131-241, especially 213-214.

²⁵ W.M. D’ABLAING, Zur “Bibliothek der Glossatoren”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 1888, 13-42, at p. 40.

²⁶ *Observationes et emanationes* Lib. 20 c. 34, in: Jacobus Cuiacius, *Opera, Pars Prior*, III, Venice 1758, column 548 ff.

²⁷ F.C. VON SAVIGNY, *Vermischte Schriften*, III, Berlin, 1850, 8-9.

²⁸ KRÜGER, *Codex Iustinianus*, 515 ff.

²⁹ In Laon, Bibliothèque Municipale 476, the initial is hard to read on the microfilm.

³⁰ Further literature on Pedro de Cardona: F. VALLS-TABERNER, Le juriste catalan Pierre de Cardona, cardinal de l’église romaine sous Alexandre III, in *Mélanges Paul Fournier*, Paris, 1929, 743-746; A. GOURON, Autour de Placentin à Montpellier: maître Gui et Pierre de Cardona, *Studia Gratiana* 1976, 337-354; A. GARCÍA Y GARCÍA, La canonística Ibérica (1150-1250) en la investigación reciente, *Bulletin of medieval canon law* 1981, 41-75, particularly 63-64.

paid attention to what had to be done in conscience. At the end of the second part, dealing with sins towards one's neighbour, there are some paragraphs on dice players. Unlike the traditional penitential literature, the *Summa* of Peñafort was characterized by an extensive reception of Roman and canon law, whereas the theological considerations had faded into the background. This very feature made the work comparable to the debate within the commentaries on the legal sources.

In this *Summa* we find an enumeration of cases in which the restitution of gambling debts should always, and beyond any doubt, take place. These involved enrichment at the expense of madmen, prodigals, minors, mutes, deaf persons, blind persons, those with chronic diseases, slaves, sons under paternal control, monks, etc. The money received had to be restored to those in charge of these persons. Moreover, where a weak individual, seeking diversion, gambled for a small amount and did not compel anyone else to join the game there was only a duty to restore to the poor.

For the remaining cases there were various opinions. After explaining that almost all scholars considered it permissible to take back what was lost in the game of dicing, Peñafort drew a distinction between two different situations. One can play voluntarily out of cupidity or one can play involuntarily, tempted by the minor or major winning of someone else. In the former case you could not claim back what you lost and, when you won, you would have to restore in conscience. In the latter, you could claim back what you lost, and if you were enriched, you had to give your winnings to the poor.

Raymond of Peñafort, *Summa*, Liber II, Tit. VIII, § IX.³¹

'(...) *Sed numquid potest recipi, quod in alea perditur? Dicunt quidam, quod non, sed pauperibus eroganda talis pecunia, arg. Causa 14 q.5 c. Non sane (C.14 q.5 c.15). Quum enim turpitudine ex parte utriusque uertitur, melior est conditio possidentis. Alii dicunt et fere omnes doctores, quod potest recipi, et probant, ut dixi supra eod. §. Item queritur. Mihi uidetur, saluo meliori iudicio, distinguendum utrum aliquis uoluntarius et ex cupiditate lusit; et tunc amisit, non potest repetere; si lucratus est, tenetur restituere saltem in iudicio animae; an inuitus et attractus, uel parum, uel per nimiam alterius importunitatem; et si tunc amisit, potest repetere; si lucratus est, non tenetur restituere, sed potest et debet pauperibus erogare (...).*'

By this interpretation Peñafort claimed to have harmonized various legal provisions, i.e. C.14 q.5 c.15, 2Comp. 5.2.10, the decretal *Dilectus filius* of Celestine III (ca. 1106-1198), D. 9.1.11 and C. 9.12.6. The influence of the civilian tradition also appears in another fragment, related to the same question. Here it was said that the excuse, that the other player participated voluntarily, is of no value. Since gambling is scandalous and disapproved of, and goes against God and all the legal provisions, it cannot provide the recipient with the good faith and the just title required to acquire ownership.

³¹ RAYMUNDUS DE PENNAFORT, *Summa*, Verona, 1744, 230.

Raymond of Peñafort, *Summa*, Liber II, Tit. VIII, § IX.³²

‘(...) *Nec obstat, si dicat lusor: licet ex cupiditate luserim, non tamen feci iniuriam proximo, quia ipse idem fecit, et uoluntarius accessit. Resp. inuitus tamen, et dolens amisit. Item quum iste ludus sit turpis et reprobatus, ut puta, quia contra Deum est et omnia iura; nullus potest per talem ludum aliquid acquirere, nec titulum, nec bonam fidem habere; iniustus enim titulus pro non titulo est habendus, ff. de pet. haered. Nec ullam (D. 5.3.13). Et malae fidei possessor dicitur, qui contra legum interdicta mercatur, C. de agricol. et cens. Quemadmodum lib. 11 (C. 11.48(47).7) (...).*’

Raymond of Peñafort presided at the commission which compiled the decretals, promulgated in 1234 by Pope Gregory IX († 1241) – the authentic and exclusive compilation we know as the *Liber Extra* or the *Decretales* of Gregory IX. The constitution *Clerici* of the Fourth Lateran Council was adopted as X 3,1,15, the decretal *Inter dilectos* from 1209 as X 5.31.11.

The Ordinary Gloss on the *Decretum Gratiani*, which was the gloss of Johannes Teutonicus, elaborated after 1234 by Bartholomeus Brixiensis, stated the early opinion that gambling debts cannot be recovered and the later view that they can. The arguments were the usual ones and the Gloss did not pronounce upon the nature of the remedy and the question whether ownership passed to the recipient.

The gloss *alea* ad D.35 c.1

‘*Clerici non debent ludere, uel ludis interesse, ut extra de ui. et ho. cler. Clerici (X 3,1,15). Nec participes erunt ludentibus, nec inspectores ludi, ut in Auth. de sac. episco. § Interdicimus col. 9 (Nov. 123.10). Sed numquid potest repeti id, quod in alea perditur? Dicunt quidam quod non, sed pauperibus est eroganda pecunia illa, arg. 14 q.5 Non sane (C.14 q.5 c.15), cum enim turpitudine uertitur ex parte utriusque, melior est conditio possidentis ff. de cond. ob tur. cau. l. Si ob turpem (D. 12.5.8). Melius credo quod possit repeti, ut ff. de aleatoribus l. ult. in fi. (D. 11.5.4) etiam usque ad quinquaginta annos, ut dicit graeca constitutio C. de religio. et sump. fun. et de alea. (cf. C. 3.43.1). Et si quis existens in alea rem suam uendiderit, tenetur de euictione, ut ff. qua. rerum actio non da. Si filio § i (D. 44.5.2.1), licet autem hic prohibeatur ludus, tamen pro conuiuio habendo potest ludi, ff. eo l. ult. (D. 11.5.4).*’

The commentary of Innocent IV (ca. 1195-1254) on the *Liber Extra*, dating from about 1245, only contained a few remarks on the restitution of gambling profits. He who had been enticed to gamble, did not have to restore his winnings, since he acted without malicious intent, but he who enticed another to play was obliged to restore them. Similarly he who gambled for a moderate amount and out of diversion would not be compelled to restore either.

³² RAYMUNDUS DE PENNAFORT, *Summa*, Verona, 1744, 230.

Innocent IV, *Commentaria super libros quinque decretalium*, ad X 3,49,8 n.4.³³

‘*De eo autem quod quis lucratur in ludis, si tractus fuit, non tenetur restituere, quia tunc nihil dolo fecisse uidetur; secus esset si alium traxisset, quia tunc reddere tenetur, quasi qui dolo fecit, sed hic forte melior erit conditio possidentis, sed si aliquid amissit potest repetere. Item qui causa recreationis modicum ludit, non tenetur restituere, arg. ff. de alea. per totum (D. 11.5) 14 quaest. 5 Non sane (C.14 q.5 c.15), ff. quadr. pau. l. i § Cum ariete (D. 9.1.11).’*

Commentaries from the middle of the thirteenth century did not add much more to the already existing opinions. The *Summa Aurea* of Hostiensis, Henricus de Segusio (ca. 1200-1271), dating from about 1253, did contain a relatively extensive fragment on the question concerning recovery of gambling debts, but only reiterated what was stated previously. It recorded the older and the more recent opinions and the distinction drawn by Raymond of Peñafort. Moreover, it stated that the title on surrendering gaming debts was unjust. Accordingly, it could not justify acquisition by prescription. Furthermore, there was again an enumeration of the cases where restitution should take place. The reasoning that gaming and gambling might take place as a diversion and without malicious intent was generally rejected.³⁴ In the Ordinary Gloss to the Liber Extra of Bernard of Parma († 1266), dating from about 1263, there was only a short gloss, reflecting the older and the more recent opinion, with a reference for the former to Placentinus.³⁵

5. Conclusions

The question whether the winner of a game has to restore the winnings he acquired is both a moral and a legal issue. The question whether the loser in such a case has a remedy to enforce restitution is chiefly a legal problem. The early decretists did not raise such questions. The question concerning the (moral) duty of the winner to restore was first mentioned by Huguccio. The legal issue whether the loser has a remedy at his disposal was first discussed by Bazianus. One could ask why the canonists adopted this problem, which beyond doubt had its origin in civilian scholarship, and why this occurred at end of the twelfth century. A decisive answer cannot be given, since the sources do not reveal the underlying rationale for raising the question. A possible reason is the further development of the doctrine of restitution in canon law, which concept has two sides: the duty of the one who gained the benefit and the right of the one who suffered the prejudice. Furthermore, we are here at the threshold of a new form of litigation in canon law, the *denuntiatio evangelica*, a

³³ INNOCENTIUS QUARTUS, *Commentaria super libros quinque decretalium*, Frankfurt, 1570 (reprint Frankfurt, 1968), fol. 461rb.

³⁴ HOSTIENSIS, *Summa*, Lyon, 1537 (reprint Aalen, 1962), ad X 5,38 (fol. 286rb-va).

³⁵ The gloss *ad aleas* ad X 3.1.15.

somewhat informal procedure, allowing the one with an interest, to take the dispute to the ecclesiastical court by a simple complaint, and allowing the court to order the accused to make restitution.

By introducing the question within canon law scholarship, the Roman law arguments and the opinions of the civilians were included. Initially the canonists, particularly Bazianus and Alanus, followed the opinion of Placentinus, namely that gaming debts cannot be reclaimed. About 1205 opinions were reversed. The author of the *Animal*, Laurentius Hispanus and Raymond of Peñafort adopted the opposite view, viz. that gambling debts can be reclaimed and this remained the prevailing view, which eventually can be found in the authoritative Ordinary Gloss on the *Decretum* and that on the *Liber Extra*. It is striking that the canonists' main focus was on the question whether there is a remedy or not. The position of the parties according to the law of property – did ownership pass to the recipient? – is sometimes entirely disregarded or treated inconsistently. In the civilian tradition this question would have determined the nature of the remedy, i.e. whether it is a real action (*vindicatio*) or a personal action (*condictio*). Time and again, this may have been of minor importance for canon law litigation, when the loser was simply allowed to bring a complaint before the ecclesiastical court and the winner could be ordered to restore the profits received. No pronouncement was made on the question whether ownership was acquired by the recipient, either through conveyance or through confusion.

The change of opinion may have been the result of the 'Greek' constitution, i.e. the constitution *Alearum lusus*, which was totally ignored by Placentinus, Huguccio and Bazianus, as if they all were unaware of its existence. Alanus seemed to be the first who knew the text, although he maintained the traditional view. The author of the *Animal* and Laurentius Hispanus let themselves be convinced by it and their view prevailed. The sources indicated that at the time the constitution was first mentioned, it was said to be recently translated into Latin by a certain cardinalis or 'b. de Cardona', while its inclusion in C. 3.43 was controversial. Maybe initially its position was not fixed, since Alanus stated that was incorporated in C. 3.44. There are early modern printed editions of the *Codex* which adopted the text of *Alearum lusus* in C. 3.44 as *lex 15*. In all probability the translator was Pedro de Cardona. It was already known that the translation of C. 3.10.2 and the epitome of C. 6.4.4 were his work. To these texts we can add now the Latin epitome of C. 3.43.1. Moreover, we should be aware that the word *cardinalis* in early thirteenth century manuscripts of canon law may refer to Pedro de Cardona, unless the text of the Liège manuscript of the *Animal* is corrupt, because the scribe had misinterpreted an abbreviated form of the name Cardona from the original he copied and transformed it into *cardinalis*. This is relevant since the glossator with siglum c. or car. for *cardinalis* was identified by André Gouron (1931-2009) as Raymond de Arènes († 1176) from Nîmes.³⁶

Cardona's Latin epitome of C. 3.43.2 could well be the very constitution Thomas Aquinas (1225-1274) referred to when later in the thirteenth century he stated

³⁶ A. GOURON, Le cardinal Raymond des Arènes: *Cardinalis?*, *Revue de droit canonique* 1978, 180-192.

that gambling is against positive civil law, which generally forbids the winner to profit. At the same time Aquinas remarked that this positive civil law does not apply to all and can be set aside by contrary custom.³⁷ However, it is doubtful whether this custom was the same as Innocent III in 1209 had branded as a *consuetudo prava*. Innocent's decretal as well as canon 16 of the Fourth Lateran Council pointed to the practical relevance of the questions surrounding gaming and gambling. In France it was apparently not unusual for clerics to dice and this was seen as undesirable and should be suppressed. Whether this was achieved is doubtful, since in the commentators on civil law and canonists of the 14th and 15th centuries we find a continuous discussion of questions concerning dicing and gambling. The same holds good for the writers of early modern scholasticism. Much new casuistry was raised, which had not featured in the era of classical canon law. By the middle of the thirteenth century, the discussion within canon law as regards the recovery of gambling debts, however, had reached a provisional end.³⁸

³⁷ THOMAS AQUINAS, *Summa Theologiae*, II II q. 32 art. 7 ad 2: '(...) *Aliquid autem videtur esse ulterius illicitum ex iure positivo civili, quod prohibet universaliter tale lucrum. Sed quia ius civile non obligat omnes, sed eos solos qui sunt his legibus subiecti; et iterum per dissuetudinem abrogari potest, (...).*'

³⁸ I would like to thank Gero Dolezalek (Leipzig) for his commentary on the draft version of this paper, Margaret Hewett (University of Cape Town) for advice and correcting the English of the text, the Max Planck Institute for European Legal History (Frankfurt/Main) where I consulted (on microfilm) most of the manuscripts quoted or referred to and the University Library of Liège where I consulted the manuscript Liège 127E, Cat. 499.

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